TAIB MOHAMAD

v.

PP

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD SAARI YUSOFF JCA
KC VOHRAH JCA
[CRIMINAL APPEAL NO: S-05-51-94]
14 JUNE 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 2,828g of cannabis - Presumption of trafficking - Section 37(da) - Whether can be invoked based on presumption of possession under s. 37(d) - Whether presumption of trafficking can only be invoked based on a finding of actual possession - Whether possession must be substantially proved - Muhammed Hassan v. PP - Whether applicable - Courts of Judicature Act 1964, s. 60 - Whether should be invoked to uphold conviction for trafficking - Whether there was sufficient evidence to sustain conviction for possession*

The accused was charged and convicted in the High Court under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 2,828g of cannabis and was sentenced to death under s. 39B(2) of the Act. This was his appeal against his conviction and sentence.

Held:
Per KC Vohrah JCA

[1] In finding the accused guilty and convicting him under s. 39B(1)(a) of the Act, the trial judge had invoked the 'presumption of trafficking' under s. 37(da) of the Act based upon the 'presumption of possession' under s. 37(d) of the Act which he had earlier invoked against the accused. This successive invocation of the two presumptions under s. 37(d) and s. 37(da) of the Act respectively against the accused was untenable. (*Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC). The accused's conviction for trafficking under s. 39B(1)(a) of the Act was therefore bad and, in view of the various infirmities in the prosecution's case, s. 60 of the Courts of Judicature Act 1964 could not be invoked to sustain the conviction. (pp 682 h-i, 683 h-i, 684 a-i & 685 a-f)

[2] There was insufficient evidence for the trial judge to infer that the accused had actual knowledge that the bag he was carrying contained cannabis. The fact that the accused threw away the said bag after he was arrested could not, without more, constitute knowledge of the contents of the bag. (pp 682 h-i, 683 h-i, 684 a-i & 685 a-f)

[3] There was however sufficient evidence to sustain a conviction under s. 6 of the Act read together with s. 39A(2)(f) thereof. The accused was unable to rebut, on a balance of probabilities, the 'presumption of possession' under s. 37(d) of the Act. (pp 682 h-i, 683 h-i, 684 a-i & 685 a-f)

[Appeal allowed; conviction under s. 39B(1)(a) replaced with conviction under s. 6 read with s. 39A(2)(f) of the Act; death sentence substituted with 14 years' imprisonment and ten strokes of the rattan.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Tertuduh telah dituduh dan disabitkan oleh Mahkamah Tinggi dengan kesalahan di bawah s. 39(B)(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 2,828g cannabis dan dihukum dengan hukuman mati di bawah s. 39B(2) Akta. Ini adalah rayuan tertuduh terhadap sabitan dan hukuman terhadapnya.

Diputuskan:
Oeh KC Vohrah HMR

[1] Dalam mendapati tertuduh bersalah dan mensabitkannya di bawah s. 39B(1)(a) Akta, hakim perbicaraan telah menggunakan "anggapan pengedaran" di bawah s. 37(da) Akta berdasarkan penggunaan "anggapan milikan" terhadap tertuduh yang dibuat sebelumnya. Penggunaan secara berturut-turut kedua-dua anggapan di bawah s. 37(d) dan s. 37(da) Akta ini adalah tidak dapat dipertahankan. (*Muhammed Hassan lwn Pendakwa Raya* [1998] 2 CLJ 170 MP). Dengan itu sabitan di bawah s. 39(B)(1)(a) Akta adalah silap dan, memandangkan terdapat beberapa kelemahan lain pada kes pendakwaan, s. 60 Akta Mahkamah Kehakiman 1964 juga tidak boleh digunakan bagi mengekalkan sabitan tersebut.

[2] Tidak terdapat keterangan mencukupi bagi hakim perbicaraan membuat andaian bahawa tertuduh mempunyai pengetahuan sebenar bahawa beg yang dibawanya mengandungi cannabis. Fakta bahawa tertuduh telah melemparkan beg tersebut selepas beliau ditangkap, tanpa keterangan lain, tidak boleh membentuk pengetahuan tentang kandungan beg.

[3] Walau bagaimanapun, terdapat keterangan yang mencukupi bagi mendukung sabitan di bawah s. 6 dibaca bersama s. 39A(2)(f) Akta. Atas imbangan kebarangkalian, tertuduh telah gagal untuk menyangkal "anggapan milikan" di bawah s. 37(d) Akta.

[Rayuan dibenarkan; sabitan di bawah s. 39B(1)(a) diganti dengan sabitan dibawah s. 6 dibaca bersama s. 39A(2)(f) Akta; hukuman mati diganti dengan hukuman penjara 14 tahun dan sepuluh sebatan.]

Case(s) referred to:
Abdullah Zawawi Yusof v. PP [1993] 4 CLJ 1 ***(foll)***
Alcontra Ambrose Anthony v. PP [1996] 1 CLJ 705 ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, ss. 37(d), (da), 39(A)(2)(f), (B)(1)(a)

For the appellant - John Kah; M/s Jayasuriya Kah & Co
For the respondent - Vong Poh Fah DPP

[Appeal from High Court Sabah & Sarawak; Tawau; Criminal Truial No: T(47)-10-1994]

Reported by Gan Peng Chiang

JUDGMENT

KC Vohrah JCA:

The appellant (the accused) was charged with trafficking in 2,828 grammes of cannabis at Jalan Sabindo Satu, Tawau, Sabah on 26 January 1994 in contravention of s. 39(B)(1)(a), punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act). The High Court convicted him on the charge and sentenced him to death. The accused appealed. We set aside the conviction on trafficking and substituted therefor a conviction for the possession of the said drug. We now give our reasons.

This Sabah High Court case was decided in 1994, well before the Federal Court case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 which decided in 1997 that it is wrong to rely on a presumption of possession of a dangerous drug under s. 37(d) of the Act to raise a presumption of trafficking in the drug. Here it is obvious that the High Court, on hindsight, was wrong in invoking a presumption of trafficking upon a presumption of possession of the cannabis. The other grave infirmity was that the judge had allowed inadmissible and irrelevant evidence to be adduced in evidence which was prejudicial to the accused and which on the basis of the Federal

Court case of *Alcontra a/l Ambrose Anthony v. PP* [1996] 1 CLJ 705 shows that its high prejudicial value could in effect have been to prejudice the case for the accused when he was called to make his defence on the trafficking charge.

The facts showed that acting on information a police party led by Inspector Hamzah bin Ahmad (PW3), the sole witness to give evidence on the surveillance and ambush on 26 January 1994, laid an ambush at Sabindo Satu Building, Tawau in the area of the staircase at 88, Beauty Saloon Sabindo at about 7pm. At 7.40pm he saw the accused climbing the stairs towards the place of ambush. He was carrying a plastic bag. An officer of the police party shouted "Police" and arrested the accused. PW3 saw that after the arrest the accused threw the plastic bag into a corridor. PW3 retrieved the black plastic bag which contained two packages. PW3 tore a bit of the two packages whereupon dried leaves were exposed. The accused was then taken to the Anti-Narcotic Branch office at Tawau together with the bag and the contents. The Government Chemist (PW1) who examined the two "brownish tape" packages that had been seized found each of them to contain a slab of compressed plant material. He conducted an analysis of the plant material and found the material to be cannabis as defined under the Act. Altogether the cannabis weighed 2,828 grammes.

During the trial a cautioned statement made by the accused was adduced during the prosecution stage of the trial. It was an exculpatory statement by the accused. To be noted is that the statement contains the particulars of the accused which showed he was a "Suluk Bajau" and that he was a Filipino. In connection with the accused being a "Suluk Bajau" and a Filipino, one has to take into account the statement of Inspector Hamzah (PW3), which obviously is irrelevant and inadmissible and which he gave in evidence:

> I was told of an information by Detective Gusibih B. Ladat, relating to a male person, believed to be a Phillipine, Bajau, who wanted to sell cannabis in the area of 88, Beauty Saloon, Sabindo.

This hearsay statement obviously refers to the accused and is highly prejudicial. (see *Alcontra*). We will come to this statement later.

At the close of the prosecution case the learned judge was of the opinion that the accused was "in custody or control of the cannabis" and applied the presumption under s. 37(d) of the Act that the accused "knew he was carrying cannabis". But the learned judge did not make a finding from the facts adduced that the accused knew the nature of the drug to be cannabis; he relied instead on the presumption under s. 37(d). The learned judge in

other words found the accused to be in possession of the cannabis by virtue of the presumption. He then invoked the presumption of trafficking (under s. 37(da)) since the weight of the cannabis was 2,828 grammes.

The case was decided in 1994. Bearing in mind the case of *Muhammed bin Hassan* decided in 1997, as stated earlier in this judgment, the invoking of the presumption of trafficking upon the presumption of possession is obviously wrong.

In considering the defence the judge should only have called the accused to make his defence on the charge of the possession of the cannabis based on the presumption under s. 37(d) that he knew the nature of the drug.

We have examined the evidence adduced in the case at the prosecution stage of the trial to see if the facts disclosed that the accused had actual knowledge of the nature of the drugs so that the judge could have relied on such facts to infer knowledge without resorting to s. 37(d) in which case the invoking of the presumption of trafficking under s. 37(da) would have been correct in law. We did not find sufficient evidence for the judge to infer that the accused had knowledge that the material was cannabis. We have already ruled as inadmissible the highly prejudicial statement by Inspector Hamzah that he had received a bit of information that a Filipino Bajau wanted to sell cannabis and we had noted the fact that the exculpatory statement of the accused showed he was a Filipino Bajau, the highly prejudicial statement cannot be relied upon to infer knowledge of the drugs in the accused. The bag that he carried was a black plastic bag and the packages within it were wrapped in brown tape and it is not possible from that to say that he knew that the material within the packages was cannabis. There was the evidence of PW3 that he saw the accused throw the bag but here we note that he threw the bag on to the corridor area after he was arrested but it is to be noted the officer who arrested him was not called to give evidence to explain under what circumstances the bag was thrown – the mere throwing of the bag without more cannot constitute knowledge of the contents of the bag. To our mind his throwing of the bag, even if true, does not unequivocally show guilt bearing in mind what was stated in *Abdullah Zawawi bin Yusof v. PP* [1993] 4 CLJ 1 by the Supreme Court:

> The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly act in that way.

There being no evidence from which his knowledge of the drugs could be inferred, the learned judge could not and should not have called the accused to make his defence on the charge of trafficking but the accused, because of the presumption of knowledge of the drug raised under s. 37(d), could be called upon his defence on a charge of possession of the cannabis.

Thus the defence evidence had to be considered in the light of the accused having to rebut the possession charge. We are aware that the learned judge had stated, "The accused had failed on a balance of probabilities to raise any reasonable doubt in the case of the prosecution that had been proved beyond reasonable doubt." There was, however, ample evidence to show that the accused had not raised any reasonable doubt on the case of the prosecution that he was carrying a bag on the day and time mentioned in the charge and that the bag contained the cannabis. His defence that he was under the impression he was carrying cigarettes for sale was rejected by the trial judge and we agree that his defence on a balance of probabilities did not rebut the presumption of knowledge under s. 37(d) that he knew the nature of the material he was carrying was cannabis.

We are of the view that bearing in mind the various infirmities of the case the justice of the case does not allow us to consider s. 60 of the Courts of Judicature Act 1964 to sustain the conviction on the trafficking charge. But there was ample evidence to sustain a conviction for possession in the cannabis under s. 6 read together with s. 39A(2)(f) of the said Act and accordingly we reduced the charge and convicted him on the reduced charge. We sentenced him to 14 years' jail from the date of arrest and ten strokes of the rattan.